No. 93-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioners,

v.

EL PASO NATURAL GAS COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the Court should review the decision below which is consistent with the unanimous decisions of other courts of appeals in holding that an employer may amend its post-retirement medical benefits plan in the absence of a waiver of that right by express language in the plan documents.

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STATUTES

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* ..... *passim*

29 U.S.C. § 1002(1)(A) v,1

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STATUTES AND REGULATIONS INVOLVED

Employee Retirement Income Security Act (Excerpts)

29 U.S.C. § 1022 PLAN DESCRIPTION AND SUMMARY PLAN DESCRIPTION

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.

* * *

(b) The . . . summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result

in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. § 1102 ESTABLISHMENT OF PLAN

(a) Named Fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite Features of Plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

Regulations of United States Department of Labor

29 C.F.R. § 2520.102-3 CONTENTS OF SUMMARY PLAN DESCRIPTION

Section 102 of the Act [29 U.S.C. § 1022] specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in subsection (j) through (n):

(a) The name of the plan, and, if different, the name by which the plan is commonly known by its participants and beneficiaries;

* * *

(d) The type of pension or welfare plan, e.g., for pension plans—defined benefit, money purchase, profit sharing, etc., and for welfare plans—hospitalization, disability, pre-paid legal service, etc.;

* * *

(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraph (j) (1) or (2) of this section as appropriate:

(1) For employee pension benefit plans, it shall also include a statement describing the

plan's normal retirement age, as that term is defined in section 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits. Such plan benefits shall be described or summarized.

(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a medical care plan, for example), only a general description is required if reference is made to detailed schedules of benefits which are available without cost to any participant or beneficiary who so requests;

* * *

(k) In the case of an employee pension benefit plan, a statement describing any joint and survivor benefits provided under the plan, including any requirement that an election be made as a condition to select or reject the joint and survivor annuity;

* * *

(*l*) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to

provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

* * *

(o) In the case of an employee pension benefit plan that will use the "cutback" rule of Internal Revenue Service Revenue Ruling 76-378, IRB 1976-40, October 4, 1976, to make retroactive changes in the vesting or accrual provisions described in the summary plan description, a statement that certain provisions of the plan are subject to amendment which directly or indirectly modifies certain plan rights and benefits, the nature of such modifications, the identification by reference of such plan provisions, and the identification by reference of the portions of the summary plan description where such provisions are described. Such statement may be either printed within the text of the summary plan description or it may be printed in a separate sheet and disclosed together with the summary plan description.

* * *

Counterstatement of the Case

El Paso Natural Gas Company ("EPNG") began to provide medical benefits to eligible retired employees in 1959, fifteen years before the enactment in 1974 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* These post-retirement medical benefits ("PRM benefits") were provided, initially, under group insurance policies with licensed insurance carriers and, later, under a self-insured trust. The insurance policies and the trust documents stated the terms of eligibility for, and described, the benefits being provided. There is no dispute that, at all times, the insurance policies and the trust documents expressly stated EPNG's reservation of its right to amend the PRM benefits plan at any time. There is also no dispute that EPNG regularly made changes, including some reductions, in the PRM benefits that it provided. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 932, 934 n.7 (5th Cir.) *reh'g denied*, 1993 U.S. App. LEXIS 11029 (5th Cir. Apr. 26, 1993).

EPNG's program for PRM benefits fell within the definition of "employee welfare benefit plan" under ERISA when the statute was enacted. 29 U.S.C. § 1002(1)(A). The PRM benefits plan was therefore required to be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). That written instrument (the "plan") was required to "provide a procedure for amending such plan, and [to identify] the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). There is no dispute that the plan under which EPNG provided PRM benefits to its retirees complied with 29 U.S.C. § 1102

by specifying that EPNG could amend the plan at any time.

ERISA, however, also required EPNG to provide retired participants with a "Summary Plan Description" (a "SPD") of its PRM benefits plan. The SPD was required to be an abridged, simplified description of the plan, "written in a manner calculated to be understood by the average plan participant, and . . . to reasonably apprise such participants . . . of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). ERISA specifically required the SPD to reference certain enumerated features and attributes of the plan. 29 U.S.C. § 1022(b). The mandated references did *not* include any reference to or description of the right to amend. *Cf.* 29 U.S.C. §§ 1102(b)(3) (plan requirements) and 1022(b) (SPD requirements).

In compliance with ERISA, EPNG distributed SPDs for its PRM benefits plan in 1977 and 1980. In contrast to the plans, neither SPD addressed in any way whether or how the PRM benefits plan might be amended. Both SPDs did expressly advise participants that

> [t]he following is intended as a Summary Plan Description of your retirement health care benefits and, in addition, serves as a vehicle of compliance as required under [ERISA] . . . .
>
> It should be noted that a Summary Plan Description cannot be, nor is it intended to be, as detailed as the formal text of the insurance policy which it summarizes . . . .
>
> Finally, if there is any conflict between that which follows in this booklet and the official

> text of the Plan, the text of the Plan will prevail.

Appendix hereto at 8a (1980 SPD).[1]

As part of its description of the benefits being provided under the PRM benefits plan, the 1980 SPD also contained a brief statement of the current terms for eligibility for those benefits:

> Upon retirement, you, your spouse, and eligible dependent children under 19 years of age are automatically insured for retirement health care benefits and the Company pays the entire cost.

Id. at 9a.

In March 1985, EPNG issued new SPDs for the PRM benefits plan that reflected amendments to the plan made in January 1985. In addition to describing the revised PRM benefits, the new SPD expressly addressed EPNG's right to amend:

> The Company reserves the right to alter, amend, delete, cancel or otherwise change the plan or any of the provisions of the plan at anytime. If the plan is terminated, coverage for you and your eligible family members will end.

Id. at 5a-6a (1985 SPD).[2] The 1985 SPD was the SPD in effect at the time of the benefit changes at issue in this case.

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[1] Reference is made only to the 1980 SPD because the 1977 and 1980 SPDs were, for all purposes related to this case, identical.

[2] In late 1983, EPNG was acquired by Burlington Northern,

In October 1985, EPNG again exercised its right to amend the PRM benefits plan. It announced that employees who retired after March 1, 1986 would have to contribute the full cost of PRM benefits. EPNG continued to make such benefits available to retirees on a group basis, meanwhile administering the plan at its own expense, even though it would no longer contribute toward the retirees' costs. *Wise*, 986 F.2d at 933 n.5.

Notwithstanding that EPNG announced this amendment well in advance of its effective date,[3] each of the Plaintiffs elected *not* to retire on or before March 1, 1986. They continued to work for EPNG after that date and, upon their subsequent retirement, they have been required to contribute the full cost of their PRM benefits.

In October 1989, the Plaintiffs initiated a civil action in the Texas state courts challenging EPNG's amendment to its PRM benefits plan. EPNG removed the action to the United States District Court for the Western District of Texas because the complaint stated a cause of action under ERISA, 29 U.S.C. § 1132(a)(1)(B), over which the federal courts have concurrent jurisdiction. 29 U.S.C. § 1132(e)(1). All parties acknowledged that there were no material

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Inc. ("Burlington") and its employee benefits began to be provided under Burlington plans. Accordingly, the 1985 SPD bears the Burlington name. There is no dispute, however, that the cited 1985 SPD applied to EPNG retirees and that it is the successor to the 1980 SPD.

[3] The Fifth Circuit noted, in this regard, that EPNG "provided a reasonable window during which eligible employees could choose to retire with full, company-paid coverage." *Wise*, 986 F.2d at 936.

facts in dispute, and each moved for summary judgment.

A primary issue addressed in the summary judgment briefs to the district court was whether the express reservation in the plans (the insurance policies) of EPNG's right to amend was controlling over any language, or lack of language, in the SPDs. While the summary judgment cross-motions were pending, the Fifth Circuit decided *Hansen v. Continental Insurance Co.*, 940 F.2d 971 (5th Cir. 1991), in which it held, on the facts of that case, that the statements made in a SPD should be given effect over conflicting terms of the plan itself.

The district court interpreted *Hansen* to prohibit EPNG from "rely[ing] on the plan in case of conflict between the plan and the SPD" and held that the language of the SPD controls. Appendix to Petition for Writ of Certiorari ("Plaintiffs' Appendix") at 18 (district court opinion).[4] The district court went on to hold, however, that EPNG's 1985 SPD, which did expressly reserve EPNG's right to amend, was the pertinent SPD as of the time of the benefits change, that it did not conflict with the plan, and that it must be given effect. The district court accordingly granted summary judgment to EPNG. *Id.* at 18-20.

The Plaintiffs appealed to the Fifth Circuit, arguing principally that EPNG's failure to reference the right to amend in the *1980* SPD waived EPNG's right to

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[4] The Clerk of this Court recently returned the Plaintiffs' Appendix to their counsel for revision in accordance with this Court's Rules. This revision may affect the pagination of the Plaintiffs' Appendix.

revise the SPD in 1985 to add a reservation of the right to amend.

The Fifth Circuit affirmed the district court's decision, making clear that the rule of primacy for the SPD set forth in *Hansen* applies only in the event of "*positive* inconsistencies" between the SPD and the full plan. *Wise*, 986 F.2d at 939 (emphasis in original). Thus, EPNG's "mere silence" on the possibility of amendment in the 1980 SPD did not abrogate EPNG's right to revise the SPD in 1985 to add an express reservation of the right to amend. *Id.* at 938. The court of appeals thus concluded that the reservation of the right to amend contained in the 1985 SPD should be given effect.[5] *Id.* at 936-40.

After seeking, and being denied, rehearing by the Fifth Circuit panel, the Plaintiffs have petitioned this Court for a writ of certiorari. EPNG herein opposes the Plaintiffs' petition, because the Fifth Circuit's decision is not only correct, but is entirely consistent with the many federal appellate decisions on the same points of law. *See* cases discussed below.

Argument

It is well settled that welfare benefits, unlike pension benefits, are not subject to ERISA's vesting requirements. *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) ("ERISA's vesting and funding requirements do not apply to welfare benefit plans.").

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[5] Because the 1985 SPD referred explicitly to EPNG's right to amend, the Fifth Circuit did not have to address whether an employer may amend a PRM benefits plan to reduce benefits when the SPD is silent on the authority for such amendment. *Id.* at 940 n.8.

The courts of appeals have uniformly confirmed, moreover, that PRM benefits are welfare benefits under ERISA and that PRM benefits are accordingly not subject to ERISA's statutory vesting and funding requirements. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 491 (2d Cir. 1988) ("[PRM benefits] plans are expressly exempted from [ERISA's] detailed minimum participation, vesting and benefit-accrual requirements and are not subject to ERISA's minimum-funding requirements."). *Accord, Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 28 (4th Cir. 1992); *Musto v. American Gen. Corp.*, 861 F.2d 897, 901 n.2 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Turner v. Local 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1225 n.5 (9th Cir. 1979); *Alday v. Container Corp. of Am.*, 906 F.2d 660, 663 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

As a consequence, the courts of appeals have uniformly determined that an employer retains the right to amend its welfare benefits plan, and thus to reduce benefits, *unless* the employer has adopted plan terms that expressly restrict that right. *Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st Cir. 1992) (judicial construction of welfare plans "must be tailored to avoid undermining Congress's 'considered decision that welfare benefit plans not be subject to a vesting requirement'"); *Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir. 1986) (no vesting occurred because there was "no contractual provision" imposing such vesting); *Fuller v. FMC Corp.*, 1993 U.S. App. LEXIS 19448, at *8-*9 (4th Cir. July 28, 1993) ("employer . . . has no ongoing obligation to pay [welfare] benefits unless

such an obligation is provided for under the terms of the then-existing plan"); *Vasseur v. Halliburton Co.*, 950 F.2d 1002, 1006 (5th Cir. 1992) (absent a "contractual assurance" by the employer that it will maintain benefits, there is no obligation to do so); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) (vesting may occur if terms are "set out in plan documents"); *Howe*, 896 F.2d at 1109 ("[w]elfare benefit plans may be modified or terminated absent the employer's contractual agreement to the contrary"); *Turner*, 604 F.2d at 1225 n.8 (welfare benefits did not vest where neither the plan nor the SPD indicated "that health and welfare benefits would be paid for the rest of [the participant's] life"); and *Alday*, 906 F.2d at 665 ("retiree's right to lifetime medical benefits . . . can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document.").

In the courts below, and in their petition for writ of certiorari, the Plaintiffs have contended that EPNG waived its right to implement the October 1985 change in benefits by adopting language in its Summary Plan Descriptions that prohibited such changes. Both the district court and the court of appeals examined the particular SPD language cited by the Plaintiffs and determined that no waiver of the right to amend had been intended or effectuated. Plaintiffs' Appendix at 18-19 (district court); *Wise*, 986 F.2d at 937-40.

In so ruling, the district court and the Fifth Circuit applied settled principles of law developed under ERISA to the particular circumstances and terms of EPNG's plan for PRM benefits. Neither of the decisions below departed from the letter or spirit of

ERISA, nor did either depart from the case law developed among the circuit courts. For these reasons, the Court should deny the request for a writ of certiorari in this case.

1. Mere Description of the Current Terms of the Plan Does Not Waive the Right to Amend.

The Plaintiffs rely on language in the 1980 SPD in an effort to show that the Fifth Circuit committed an egregious error by holding that EPNG did *not* waive its right to amend its PRM benefits plan. Appendix hereto at 7a-9a (pertinent excerpts). That document provided that

> [u]pon retirement, you, your spouse, and eligible dependent children under 19 years of age are automatically insured for retirement health care benefits and the Company pays the entire cost.

Id. at 9a. The Plaintiffs argue that the quoted passage constituted a binding waiver of EPNG's right to amend the plan.

Examination of this language makes clear, however, that it was merely a description of the current terms of the plan and that it did not address the right to amend in any way. The wording is entirely in the present, not the future, tense. Accordingly, the passage speaks only to benefits available "upon retirement" at the current time, under the current conditions of entitlement. The passage does not address, one way or the other, expressly or impliedly, the employer's right to amend. *See* below. Certainly, there is no "strong prohibitory or granting language" that could constitute a waiver of the statutory right to amend the plan. *Wise*, 986 F.2d at 938.

Furthermore, the Fifth Circuit's reading of the 1980 SPD accords with the reading that other courts of appeals have given to similar plan language. The other courts of appeals have uniformly concluded that language which simply describes existing benefits does not cause those benefits to vest. Specifically, the Sixth Circuit held that

> [t]he brief discussion of post-retirement benefits concluded with a statement—perfectly accurate at the time—to the effect that "[y]ou are not required to contribute for these benefits after your retirement." The [document] said nothing one way or the other about the possibility of future amendments regarding [the] benefits.

Musto, 861 F.2d at 903. *See also Alday*, 906 F.2d at 662-63 (representation that upon retirement "[h]ealth insurance [is] available to you" whereas "[d]ental coverage ends" held not sufficient to preclude subsequent elimination of health insurance benefits); *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812, 814 (8th Cir. 1988), *vacated and remanded sub nom. DeGeare v. Slattery Group, Inc.*, 489 U.S. 1049 (1989) (statement in SPD that "[i]f you retire with 10 or more years of service on or after January 1, 1976, you will continue to receive" benefits did not preclude subsequent elimination of benefits).[6]

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[6] *DeGeare* was vacated and remanded by this Court following its decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), concerning the standard of review to be employed by courts in reviewing benefit decisions made by plan administrators. However, the Eighth Circuit confirmed in *Howe*, 896 F.2d at 1109 n.4, that "[t]he basic contract interpretation prin-

2. Silence in the SPD on the Matter of Amendment Does Not Waive the Right to Amend.

The Plaintiffs also argue that the 1980 SPD's failure to refer explicitly to the employer's right to amend waived EPNG's right to do so. Particularly since the right to amend was at all times unequivocally reserved in the plan itself, however, that proposition cannot possibly apply, unless EPNG was under an affirmative duty, sufficient to justify an adverse inference, to refer to its right to amend in the SPD. But there was, and is, no such obligation for employers.

Under the fiduciary provisions of ERISA, all employee benefit plans are required to be administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). Under 29 U.S.C. § 1102(a)(1), every plan "shall be established and maintained pursuant to a written instrument." That written instrument is required to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3).

The fiduciary provisions of 29 U.S.C. §§ 1102 and 1104 make no reference to the SPD. The requirement to maintain the SPD is created as part of the separate reporting and disclosure provisions of 29 U.S.C. § 1022.

In contrast to the "written instrument" provision of 29 U.S.C. § 1102, which *does* expressly require reference to the possibility of amendment in the plan itself, nothing in 29 U.S.C. § 1022(b) requires the SPD to mention the right to amend. Although 29 U.S.C.

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ciples of *DeGeare* . . . still apply." It is those "basic contract interpretation principles" for which EPNG cites *DeGeare*.

§ 1022(b) mandates that the SPD set forth the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," the Department of Labor has affirmed that these are items "that a participant or beneficiary might *otherwise* reasonably expect the plan to provide on the basis of the description of benefits required [to be stated in other parts of the SPD]." 29 C.F.R. § 2520.102-3(*l*) (emphasis added). The SPD disclosure requirements thus clearly relate to an individual employee's eligibility under the existing terms of the plan, not to the possibility that those terms might be amended in the future.[7]

Comparing the provisions of 29 U.S.C. §§ 1102 and 1022 makes it clear that Congress required a reference to the right to amend only under 29 U.S.C. § 1102, in the full plan. No such requirement exists for SPDs under 29 U.S.C. § 1022. As succinctly put by the Fifth Circuit in *Wise*,

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[7] A separate provision of the Department of Labor regulations also compels the conclusion that the right to amend was *not* required to be stated in the 1980 SPD. In 29 C.F.R. § 2520.102-3(o), the Department specifically required that the SPD contain,

> [i]n the case of an employee *pension* benefit plan that will use the "cutback" rule [under the Internal Revenue Code] . . . a statement that certain provisions of the plan are subject to amendment which directly or indirectly modifies certain plan rights and benefits . . . .

Id. (emphasis added). No such requirement is applied to any welfare plan. Under usual rules of construction, the presence of this specific disclosure requirement for certain pension plans means that there is no such requirement applicable to other plans, including welfare plans such as the PRM benefits plan at issue here.

> Plaintiffs complain strenuously that no pre-1985 SPDs contained the amendment/termination language. This omission, they insist, is tantamount to a promise to maintain post-retirement health care . . . . We do not agree, particularly when (1) ERISA does not mandate the inclusion within SPDs of amendment rights or procedures and (2) any pre-1985 silence is followed by an unequivocal statement to the contrary. [*EPNG's*] *failure to include that which ERISA does not require cannot act to prejudice* [*EPNG*] *by imposing an infinite duty.*

Wise, 986 F.2d at 936-37 (emphasis added).

3. The Third Circuit's Decision in *Alexander v. Primerica Holdings* is Entirely Consistent With the Fifth Circuit's Decision in Wise.

The courts of appeals have established, as noted above, (i) that an employer's right to amend a PRM benefits plan is *not* restricted by the statutory vesting requirements of ERISA and (ii) that, to support a contractual waiver of the employer's right to amend a PRM benefits plan, the pertinent plan document must contain express language restricting that right. Notwithstanding the Plaintiffs' unfounded assertion to the contrary, the decision in *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), is entirely consistent with that line of authority and, accordingly, with the Fifth Circuit's decision in *Wise*.

In *Alexander*, the portion of the plan[8] addressing the right to amend provided that

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[8] In *Alexander*, no formal plan existed and the "right to amend" clause came from summary plan descriptions. *Id.* at 91.

> [t]he Company expects to continue this plan *indefinitely*, but *necessarily* reserves the right to amend, modify, or discontinue the Plan in the future *in conformity with applicable legislation*.

Id. at 92 (emphasis added). The *Alexander* plaintiffs, unlike the Plaintiffs here, had already retired and were receiving benefits when the employer amended the PRM benefits plan by increasing the amount of the retirees' required contribution. The plaintiffs asserted that the underscored terms of the plan represented contractual restrictions on the employer's right to amend. The district court held on summary judgment that the plan language did not restrict the employer's right to amend and dismissed the plaintiffs' claims.

On appeal, the Third Circuit found that each of the underscored terms introduced a material ambiguity into the reservation of the right to amend.[9] Accordingly, the court of appeals remanded the case to the district court for trial to resolve the meaning of the ambiguous phrases. Significantly, the court of appeals noted that the plan in *Alexander* could have stated simply that "the Plan may be amended at any time" and that, if such unadorned wording had been used, the plan would have been unambiguous. *Id.* at 93.

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[9] The Third Circuit observed that "necessarily" might mean either "understandably" or "as a necessary result or consequence;" that "in conformity with applicable legislation" might mean either in conformity with a "change in the law" or merely in conformity with existing law; and that "indefinitely" might mean either "continuing without limit" or "undetermined." *Id.* at 92-93.

Alexander is consistent with those few cases, all involving PRM benefits provided pursuant to collective bargaining agreements, in which the employer has adopted language expressly restricting its right to amend. For example, in *Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F. Supp. 196 (W.D.N.Y. 1984), the court found that the following language operated to vest employees who had retired and were receiving benefits before the date of the disputed amendment:

> The Board of Directors of the Corporation shall have the right to amend or terminate this Plan at any time; provided, however, that *said Board shall not adopt any amendment to this Plan which shall deprive any participant . . . of any benefits to which [he or she] shall theretofore have become entitled . . . .*

Id. at 209 (emphasis added; original emphasis deleted).

Similarly, in *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986), vesting was imposed pursuant to a plan which read:

> *Despite anything to the contrary herein contained*, present pensioners [and those meeting certain other qualifications] . . . will, *subject to the conditions hereinafter set forth*, receive [benefits] for the pensioner and his spouse, if any, *during the life of the pensioner* at no cost to the pensioner.

Id. at 611 (emphasis in original). The court in *Policy* found that each of the underscored clauses in the plan

represented a restriction on the employer's right to amend the plan to reduce benefits. *Id.* at 614.

Clearly, the *Eardman* and *Policy* decisions, which impose the vesting of PRM benefits, both rest on restrictive plan language that does not exist in EPNG's plan documents. In that regard, the *Eardman* and *Policy* opinions confirm the general rule that, absent express restrictive language, the employer's right to amend is unrestricted.

Unlike the employer in *Alexander*, EPNG included no restrictive language in its SPDs. Indeed, in language very close to the 'easy case' suggested by the Third Circuit in *Alexander*, EPNG's 1985 SPD stated that "[t]he Company reserves the right to alter, amend, delete or otherwise change the plan or any of the provisions of the plan at anytime." Appendix hereto at 5a-6a. For that reason, *Alexander* and *Wise* represent merely opposite outcomes reached by application of the identical principle of law, and they are therefore entirely consistent both with each other and with the settled line of judicial authority on this subject. In sum, there is no conflict among the circuit courts that would justify the exercise of this Court's discretionary review.

Conclusion

For all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari filed by the Plaintiffs.

Respectfully submitted,

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